

¹ The record includes medical evidence that refers to other individuals.

Appellant came under the care of Dr. Kambiz Behzadi, a Board-certified orthopedic surgeon, who submitted reports from January 16, 2001.²

In a report dated November 20, 2002, Dr. Behzadi stated that appellant had chronic right rotator cuff tendinitis, a possible partial rotator cuff tear and mild acromioclavicular joint arthritis. He related her symptoms of minimal occasional pain in the right shoulder with general work and leisure activities and increased pain upon heavy lifting and shoulder-level work. Range of motion findings were as follows: right flexion of 160 degrees as compared to 170 degrees on the left, extension of 70 degrees bilateral, external rotation of 55 degrees as compared to 60 degrees on the left, internal rotation of 35 degrees as compared to 45 degrees on the left and abduction of 90 degrees as compared to 110 degrees on the left. He noted negative impingement on the right shoulder and reported right rotator cuff strength was five by five with abduction and external rotation. Dr. Behzadi further noted a negative Jobe's test and O'Brien's sign. An instability examination was unremarkable and normal motor strength was noted. Dr. Behzadi advised that appellant's condition was permanent and stationary.³

On May 6, 2003 appellant filed a claim for a schedule award.⁴ On May 16, 2003 the Office referred her and a statement of accepted facts to Dr. Emerson Jou, Board-certified in internal medicine, for an impairment evaluation of her right upper extremity. On June 10, 2003 Dr. Jou noted his findings on physical examination and provided range of motion measurements for appellant's right shoulder. He diagnosed chronic moderate pain in the right shoulder and upper right arm secondary to unresolved muscle strain. Dr. Jou noted no swelling, muscle atrophy or weakness and no bony deformity. Appellant's sensations were intact with moderate tenderness in the right deltoid and mild tenderness in the remaining shoulder groups. Pain was noted in the right shoulder upon lateral bending to the left side. Range of motion findings were forward elevation of 140 degrees with pain, backward flexion of 50 degrees, abduction of 130 degrees with pain, adduction of 40 degrees, internal rotation of 80 degrees with pain, external rotation of 90 degrees and extension of 50 degrees. Dr. Jou further noted mild intermittent pain rest, severe intermittent pain upon activities. Appellant related that, because of the pain she was limited from prolonged writing, typing, reaching, pulling, pushing, carrying, lifting, housecleaning, sports and abrupt movements of the right upper extremity. Dr. Jou diagnosed soft tissue injury in eight muscles as opposed to rotator cuff tear or impingement, noting chronic moderate pain in the right shoulder and upper secondary to unresolved muscle strain following a work injury.

² On September 10, 2002 appellant filed a claim for a recurrence of disability alleged to have occurred on August 29, 2002. The record does not include a final Office decision on this claim and thus it is not before the Board.

³ Dr. Behzadi noted that appellant's March 7, 2001 magnetic resonance imaging (MRI) scan reveal a possible partial right rotator cuff tear. However, that report merely stated that the MRI scan did not reveal definitive evidence of a complete rotator cuff tear.

⁴ On May 12, 2003 the Office returned the claim to appellant because it had not been submitted through the employing establishment. The record does not include a subsequent claim from his through the employing establishment. Nonetheless, the Office began to develop the claim on May 16, 2003 by referring it to Dr. Jou for a second opinion.

On July 22, 2003 the Office medical adviser applied the findings of Dr. Jou to the (fifth edition 2001) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, to find that appellant had an impairment of the right upper extremity based on a loss of range of motion as follows: loss of flexion two percent and loss of extension, 0 percent, (Figure 16-40, page 476), loss of abduction, 2 percent and loss of adduction, 0 percent (Figure 16-43, page 477); loss of internal rotation, 0 percent and loss of external rotation, 0 percent (Figure 16-46, page 479) for a total of 4 percent. Following the procedure set forth in Table 16-10, page 482, the Office medical adviser multiplied the severity of the sensory deficit by the maximum impairment value of the nerve structure involved to obtain the upper extremity impairment for that structure, *i.e.*, she multiplied appellant's Grade 3, or 60 percent sensory deficit, by the maximum impairment value of the suprascapular nerve which is 5 percent (Table 15-15, page 492), resulting in an impairment of 3 percent. The Office medical adviser then indicated that the total impairment for the right upper extremity equaled seven percent⁵ and advised that the date of maximum improvement was November 20, 2002.

On August 18, 2003 the Office issued a schedule award for a seven percent impairment of the right upper extremity. The award ran for 21.84 weeks, from November 20, 2002 to April 21, 2003.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the top percentage of loss.⁸ However, the Act does not specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁹

Section 8123 of the Act provides that, if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹⁰

⁵ The Office medical adviser did not specifically refer to the Combined Values Chart.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.304 (1999).

⁸ 5 U.S.C. § 8107(c)(19).

⁹ *James R. Doty*, 52 ECAB 163 (2000).

¹⁰ *Brenda C. McQuiston*, 54 ECAB ____ (Docket No. 03-1725, issued September 22, 2003); *Shirley L. Steib*, 46 ECAB 39 (1994).

ANALYSIS

In this case, the record includes a report from Dr. Behzadi, appellant's treating physician and a Board-certified orthopedic surgeon, who evaluated appellant with respect to her range of motion of the right shoulder, rotator cuff strength, performed an instability examination and motor strength tests and included review of January 16, 2001 x-rays and a March 7, 2001 right shoulder MRI scan. Dr. Behzadi's data supported a 10 percent impairment rating for the right upper extremity.

However, the record is devoid of an explanation as to why the Office did not consider this report in the development of the medical evidence. Before the A.M.A., *Guides* may be utilized, a description of appellant's impairment must be obtained from her attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment."¹¹ There is no indication in the record that the Office requested an impairment opinion based on the A.M.A., *Guides* from the treating physician in spite of a prior impairment report having been submitted. Further, the Office did not provide a copy of Dr. Behzadi's report to the second opinion physician which contained information relevant to the impairment rating process.¹² Although the Office returned appellant's claim to her because she failed to submit the form through the employing establishment, it appears that Dr. Behzadi's report remained part of the record inasmuch as the Office medical adviser stated that November 20, 2002 was the date of maximum medical improvement, the same date as noted by Dr. Behzadi.¹³ However, the Office medical adviser relied on Dr. Jou's report to establish appellant's impairment rating without explaining the deficiencies or inconsistencies, if any, in Dr. Behzadi's report. Yet the Office medical adviser relied on Dr. Behzadi's data of maximum medical improvement in her report. The Board notes that Dr. Jou did not indicate whether appellant had reached maximum medical improvement and if so, by what date.¹⁴

The Board finds, therefore, that the record contains an unresolved conflict between Dr. Behzadi for appellant and the physician for the Office regarding the percentage of impairment of the upper extremity. The case will be remanded to the Office for further development, including the appointment of an impartial medical examiner to resolve the conflict. Following this and any other necessary development, the Office shall issue an appropriate decision in the case.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (August 2002).

¹² *Id.* at Chapter 2.810.9 (a) (June 2002). *See Helen Claxton*, Docket No. 99-932 (issued October 2, 2000). (It is a long-established Office policy to submit the entire medical record for referral physicians to review).

¹³ The Office received copies of Dr. Behzadi's report on April 10 and May 5, 2003, the day before it received appellant claim form on May 6, 2003; however, the Office returned her claim on May 12, 2003.

¹⁴ *See supra* note 11 at Chapter 2.808.6 (b)(1) (August 2002).

CONCLUSION

The Board finds that the case is not in posture for a decision due to a conflict of medical opinion between Dr. Behzadi, for appellant and the Office medical adviser, for the government.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 18, 2003 is hereby set aside and the case remanded to the Office for further development consistent with this decision.

Issued: June 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
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